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MEMORANDUM OF POINTS AND AUTHORITIES

ISSUES TO BE DECIDED

1. Have Plaintiffs pleaded plausible facts relating to Defendants', including CBA's, obstructive claims processing practices, bad-faith denials of coverage, and deceptive marketing?

2. Do the allegations in Plaintiffs' Complaint—which are corroborated, not belied, by the documents separately and improperly introduced into the record by Defendants—sufficiently state claims for relief against CBA for (1) violations of Cal. Bus. & Prof. Code § 17200, *et seq.*; (2) violations of Cal. Bus. & Prof. Code § 17500, *et seq.*; (3) breach of contract; (4) breach of the implied duty of good faith and fair dealing; and (5) unjust enrichment?

INTRODUCTION

Defendants¹ collaborated to develop, market, sell, and administer Short-Term Medical (“STM”) insurance policies that do not provide the coverage they purport to provide, miring Plaintiffs and Class members in a nightmare of obstruction, delay, and denial at the moment insurance matters: when Plaintiffs are facing large, even catastrophic, medical bills.

The STMs at issue here are not Affordable Care Act (“ACA”) compliant ones, in which pre-existing conditions must be covered—and Plaintiffs nowhere claim otherwise. However, as Plaintiffs allege, Defendants engage in distinct fraudulent and bad faith conduct by misusing and misapplying the pre-existing conditions limitations (and engaging in related misconduct) to deny claims that should be paid via improper delay and unlawful post-claims underwriting. The common alleged scheme, pled with specificity, thus consists of both fraudulent marketing and improper claims practices.

CBA seeks to disclaim culpability in this scheme by claiming, *inter alia*, that it was not a party to the fraudulent misrepresentations and omissions related to the marketing of the STMs, or the unconscionable bad-faith administration of the policies. This position does not withstand scrutiny. The documents referenced in Plaintiffs' Complaint, and even those improperly

¹ Defendant on this motion is Consumer Benefits of America (“CBA”). Health Insurance Innovations, Inc. (“HII”) and HCC Life Insurance Company and HCC Medical Insurance Services LLC (“HCC”) are also Defendants in this action, and are included within the term “Defendants” where no specific Defendant is indicated.

1 introduced by Defendants into the record, make clear that CBA was involved and featured in the
 2 marketing of the STMs at issue, and was a party to the contract created when Plaintiffs and Class
 3 members signed up for coverage under the STMs. These allegations support Plaintiffs' claims of
 4 unfair competitive practices, deceptive advertising, breach of contract, bad faith, and unjust
 5 enrichment at the pleading stage.

6 CBA's motion to dismiss should be denied in its entirety.

7 **FACTUAL AND PROCEDURAL BACKGROUND**

8 As a threshold matter, CBA's Motion does not (and cannot) challenge the accuracy of the
 9 facts stated in Plaintiffs' Complaint, and in fact barely addresses them. As described below,
 10 Plaintiffs allege that CBA has colluded with Defendants HCC and HII in a fraudulent scheme to
 11 provide insurance policies to Class members that are practically worthless in that there is a
 12 systematic denial of insureds' claims under a bad faith and deceptive application of its
 13 undisclosed policies, in violation of California law.

14 **A. Defendants' Sale and Administration of Short-Term Medical Insurance
15 Policies.**

16 Defendants HCC, HII, and CBA *collectively* market and administer short-term medical
 17 insurance policies ("STMs") to California consumers. Complaint (Dkt. No. 1) ("Compl.") ¶¶ 17-
 18, 22, 22 n.5, 23, 51-53, 55, 57. Defendants HCC and HII have jointly developed—and market
 19 and provide—their STM in 45 states, including California. *Id.* ¶¶ 17, 22, 22n.5, 23, 51-53, 55.
 20 Defendant CBA colludes with HCC and HII by acting as the group administrator for the STMs,
 21 thereby allowing HCC and HII to avoid more stringent regulatory requirements governing
 22 individually-issued health insurance policies. *Id.* ¶¶ 18, 57. In other words, CBA provides a
 23 cloak of legitimacy to HCC and HII's fraudulent scheme.

24 **B. Defendants' Common Alleged Practices Cause Common Injuries.**

25 In conjunction with Defendants HCC and HII, CBA facilitates the provision of insurance
 26 policies whose claim processing procedures—and the requirements placed upon the insureds—
 27 are purposely engineered and uniformly applied to allow the delay and denial of the claims of
 28 policyholders. *Id.* ¶¶ 3, 54, 56, 58-73. Upon submitting claims, insureds are required to provide

1 every identifiable medical record in their history, regardless of whether such record relates to the
 2 claim at issue, and notwithstanding that this requirement is not disclosed in advance. *Id.* ¶¶ 3, 26-
 3 27, 33-37, 39-73. This requirement, common to all Class members, gives Defendants three
 4 common avenues for denying valid claims, effectively and improperly guaranteeing that Class
 5 members' often large bills go unpaid.

6 First, Defendants comb through all records provided by the insured in an effort to
 7 characterize the claim at issue as a "pre-existing condition." *Id.* ¶¶ 3, 26-27, 33-37, 39-57, 63-73.
 8 Defendants uniformly omit any appropriate explanation of the scope of this exclusion from their
 9 public-facing marketing materials. *Id.* ¶¶ 3, 39-57, 63-73. However, once a claim is submitted,
 10 the term is interpreted so broadly and incorrectly, and in such bad faith, as to encompass virtually
 11 *any* medical condition, regardless of when—or even whether—it was diagnosed or treated. *Id.* If
 12 the insured's presented claim can be linked to *anything* in the insured's past, *from any point in*
 13 *time*, the claim is denied. *Id.*

14 Second, when there is no plausible way to link an insured's claim to a prior medical
 15 condition, Defendants again demand to search through all available records—again, regardless of
 16 their relation to the claim—seeking evidence of a condition that would have rendered the
 17 claimant ineligible for coverage under the STM, thereby allowing Defendants to void the policy
 18 and not pay the claim. *Id.* ¶¶ 3, 26-27, 33-37, 56-73. This practice is also uniform to all Class
 19 members. *Id.*

20 Third, Defendants' policy and practice is to premise refusals to pay on common and
 21 incorrect assertions that there is insufficient information to process claims. *Id.* ¶¶ 3, 26-27, 33-37,
 22 54, 58-73. This allows Defendants to sidestep paying proper claims because it would be
 23 impossible for the insured to provide the level of detail purportedly needed. *Id.*

24 In light of this common conduct, Defendants have also engaged in serial and uniform
 25 misrepresentations and omissions to Class members. Namely, they have marketed health
 26 insurance policies that, because of the unconscionable claims-handling processes described
 27 above, improperly and unlawfully exclude material numbers of claims, making the insurance
 28 nearly worthless. *Id.* ¶¶ 3, 39-57; 104-14. Through various declarations, HCC has introduced

1 copious pages of website screen shots and welcome kits. *See generally*, Dkt. Nos. 50-52.
 2 Introduction of this material is improper on a motion to dismiss. Notably, though, none of these
 3 documents, nor any documents referenced in Plaintiffs' Complaint, alert a reasonable insured or a
 4 prospective insured to the virtually limitless exclusions (and burdensome record requests) applied
 5 by Defendants in their claims-handling practices. Instead, these material facts are omitted. *Id.*;
 6 *see also* Compl. ¶¶ 3, 39-72; 104-14. Such misrepresentations and omissions constitute false
 7 advertising. *Id.* ¶ 104-14.

8 Defendants' internal policies and procedures, marketing representations, and customer
 9 service scripts reveal that the above-described practices are uniform to the Class. A
 10 whistleblower contractor in HCC's customer service department confirmed that these policies and
 11 procedures are designed to frustrate Class members' attempts to appeal a claim's denial or to
 12 provide the information purportedly sought by Defendants, and further confirmed that Defendants
 13 have created a rigid script for dealing with insureds, from which their employees cannot deviate.
 14 *Id.* ¶ 58-72. As the whistleblower states: "[T]he name of the game is runaround. . . . It really
 15 felt like everything was designed to be so cumbersome that the customer would either get
 16 frustrated and give up or they could stall long enough to not have to pay out on the claim. . . .
 17 The whole idea here is that we're a legal buffer between HCC and [the insured] as was made
 18 crystal clear in training when they said outright that we'd be thrown under the bus if we ever
 19 deviated from the script." *Id.* ¶ 67.

20 As discussed in Plaintiffs' Opposition to Defendants' Motion to Stay (Dkt. No. 66),
 21 Defendants minimize and misconstrue the Complaint, asserting that 'Plaintiffs say X is non-
 22 disclosed but it is disclosed.' This misses the point. Defendants engage in a common and
 23 fraudulent scheme whereby they take Class members' premium payments, only to subject those
 24 insureds to a claims process that is designed to uniformly and unconscionably deny the payment
 25 of valid claims. Plaintiffs' well-pleaded claims of complex fraud are cognizable under statutory
 26 and common law against all Defendants, including CBA. Compl. ¶¶ 90-146.

27 **C. Plaintiffs' Experiences and the Underlying Litigation.**

28 Plaintiffs Azad and Buckley were, respectively, insured under Defendants' STMs. *Id.* ¶¶

1 19-38. Each Plaintiff purchased their STM policies in the belief that such policies would cover
 2 unexpected medical conditions. *Id.* Each Plaintiff *did* suffer an unexpected and major health
 3 incident and, in reliance upon the language of the policies, properly submitted claims. *Id.* Upon
 4 submitting claims to Defendants, however, each Plaintiff was asked for an ever-increasing
 5 number of medical records. *Id.* Specifically, as pled in the Complaint and supported with explicit
 6 references to Defendants' records,² Plaintiffs' were not merely required to provide medical
 7 records relevant to their claims; rather, they were required to provide *all* medical records,
 8 provider notes, and labs for the five years preceding their claims. *Id.* ¶¶ 26, 33; *see also*,
 9 Declaration of John Padgett in Support of HCC Life Insurance Company and HCC Medical
 10 Insurance Services, LLC's Motion to Dismiss and Their Alternative Motion to Strike Class
 11 Allegations ("Padgett Decl.") at Exs. 16-19.

12 After months of complying with Defendants' requests for more information, both Azad
 13 and Buckley were again told that their claims could not be processed. Compl. ¶¶ 26-28, 33-38;
 14 Padgett Decl. at Exs. 16-19. Plaintiff Azad's bills totaled roughly \$12,000, and Plaintiff
 15 Buckley's roughly \$3,500. Motion to Stay (Dkt. No 63) at n.4. Plaintiffs each made continual
 16 efforts to provide sufficient information to Defendants, and were continually asked for more.
 17 Compl. ¶¶ 26-38. Discouraged and convinced that Defendants were not acting in good faith,
 18 Plaintiffs, consistent with the conduct of reasonable Class members, gave up and realized they
 19 would have to pay their medical bills directly. *Id.*

20 Thus, like all Class members, Plaintiffs were: (1) misled into purchasing insurance
 21 policies that they believed would cover unforeseen medical events; (2) subjected to Defendants'
 22 unconscionable claims-handling practices, despite complying in good faith with Defendants'
 23 increasingly-unreasonable (and impossible to fulfill) requests; and (3) ultimately had their claims
 24 files closed by Defendants, in bad faith, which left Plaintiffs (like all Class members) on their
 25 own to resolve their unpaid, substantial medical bills.

26 _____
 27 ² As explained more fully in Plaintiffs' concurrently-filed Opposition to Defendant HCC's
 28 Motion to Dismiss (at pp. 7-8), Defendants are incorrect to suggest the Court should apply the
 "incorporation by reference" doctrine to consider voluminous additional materials as part of the
 Complaint. The doctrine is inapposite here.

1 **D. Procedural History.**

2 Plaintiffs filed their Complaint on February 7, 2017, alleging five claims for relief: (1)
 3 violations of Cal. Bus. & Prof. Code § 17200, *et seq.* (“UCL”); (2) violations of Cal. Bus. & Prof.
 4 Code § 17500, *et seq.* (“FAL”); (3) breach of contract; (4) breach of the implied covenant of good
 5 faith and fair dealing; and (5) unjust enrichment. Defendant CBA then filed the instant Motion to
 6 Dismiss. Dkt. No. 58 (“Mot.”).³

7 **LEGAL STANDARDS**

8 A Rule 12(b)(6) motion tests the legal sufficiency of the claims asserted in the complaint.
 9 Dismissal is appropriate only where the complaint lacks “a cognizable legal theory” or “sufficient
 10 facts to support a cognizable legal theory.” *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d
 11 1097, 1104 (9th Cir. 2008). The issue is not whether the non-moving party will ultimately prevail
 12 but whether it is entitled to offer evidence to support the claims asserted. *Gilligan v. Jamco Dev.*
 13 *Corp.*, 108 F.3d 246, 249 (9th Cir. 1997). The Court should draw “all reasonable inferences from
 14 the complaint in [plaintiffs’] favor,” *Mohamed v. Jeppesen Dataplan, Inc.*, 579 F.3d 943, 949 (9th
 15 Cir. 2009) (quoting *Doe v. United States*, 419 F.3d 1058, 1062 (9th Cir. 2005)), and “accept the
 16 plaintiffs’ allegations as true and construe them in the light most favorable to the plaintiffs.”
 17 *Siracusano v. Matrixx Initiatives, Inc.*, 585 F.3d 1167, 1177 (9th Cir. 2009). A complaint need
 18 only “contain sufficient factual matter, accepted as true, ‘to state a claim to relief that is plausible
 19 on its face.’” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1940 (2009) (quoting *Bell Atl. Corp. v.*
 20 *Twombly*, 550 U.S. 544, 570 (2007)).

21 Plaintiffs’ claims under the deceptive prong of the California UCL and the False
 22 Advertising Law must satisfy Rule 9(b).⁴ The Ninth Circuit has long construed Rule 9(b) to
 23

24 ³ Each Defendant filed a separate Motion to Dismiss (Dkt. Nos. 48, 58, 60) and, in the case of
 25 HCC and HII, a Motion to Strike (Dkt. Nos. 49, 60), as well as a Motion to Stay (Dkt. No. 63).

26 ⁴ It is unclear whether CBA asserts that any of Plaintiffs’ other claims—namely, the common-law
 27 claims and the claims under other prongs of the UCL—must satisfy Rule 9(b), but no such
 28 requirement exists. Under Ninth Circuit law, “where fraud is not an essential element of a claim,
 only allegations (‘averments’) of fraudulent conduct must satisfy the heightened pleading
 requirements. Allegations of non-fraudulent conduct need satisfy only the ordinary notice
 pleading standards of Rule 8(a).” *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1105 (9th Cir.
 2003).

1 require only that “allegations of fraud are specific enough to give defendants notice of the
2 particular misconduct which is alleged to constitute the fraud charged so that they can defend
3 against the charge and not just deny that they have done anything wrong.” *United States for Use*
4 and *Benefit of HCI Sys., Inc. v. Agbayani Construction Co.*, 2014 WL 4979336, at *3 (N.D. Cal.
5 Oct. 6, 2014) (quoting *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007) (per curiam)).

6 Thus, while Rule 9(b) imposes a heightened standard, it does not require a plaintiff to
7 allege each and every detail about the alleged conduct. *Cooper v. Pickett*, 137 F.3d 616, 627 (9th
8 Cir. 1997) (“[W]e cannot make Rule 9(b) carry more weight than it was meant to bear.”); *Walling*
9 *v. Beverly Enters.*, 476 F.2d 393, 397 (9th Cir. 1973); *see also Schlagal v. Learning Tree Int’l*,
10 1998 WL 1144581, *8 (C.D. Cal. Dec. 23, 1998) (“The Court must strike a careful balance
11 between insistence on compliance with demanding pleading standards and ensuring that valid
12 grievances survive.”); *Davenport v. Seattle Bank*, 2015 WL 6150296, at *4 (C.D. Cal. Oct. 15,
13 2015) (“[Rule 9(b)] must be read in harmony with Fed. R. Civ. P. 8’s requirement of a ‘short and
14 plain’ statement of the claim.”).

15 Moreover, “the requirement of specificity is relaxed when the allegations indicate that a
16 defendant must necessarily possess full information concerning the facts of the controversy’ ‘or
17 when the facts lie more in the knowledge of the opposite party.’” *Comerica Bank v. McDonald*,
18 2006 WL 3365599, *2 (N.D. Cal. Nov. 17, 2006) (quoting *Tarmann v. State Farm Mut. Auto. Ins.*
19 *Co.*, 2 Cal. Rptr. 2d 861, 863 (1991)).

20 Plaintiffs' fraud-based allegations readily satisfy the requirements of Rule 9(b).

ARGUMENT

A. Plaintiffs Adequately Allege Fraud-Based Claims Under the UCL and the FAL Against CBA.

24 The FAL, and the UCL’s “fraud” prong, both prohibit representations that are false or that
25 are “misleading or which ha[ve] a capacity, likelihood or tendency to deceive or confuse the
26 public.” *Williams v. Gerber Prods. Co.*, 552 F.3d 934, 938 (9th Cir. 2008). As CBA
27 acknowledges, whether a representation has a tendency to deceive is determined based on its
28 likely impact on a “reasonable consumer.” *Id.*; *see also Consumer Advocates v. Echostar*

1 *Satellite Corp.*, 113 Cal. App. 4th 1351, 1360 (2003) (cited by CBA).

2 Ninth Circuit courts have repeatedly recognized that whether a representation has a
 3 tendency to deceive “will usually be a question of fact not appropriate for decision on [a motion
 4 to dismiss].” *Williams*, 552 F.3d at 938-40 (dismissal at pleading stage is “rare”); *see also, e.g.*,
 5 *Jones v. Nutiva*, 2016 WL 5210935, at *7 (N.D. Cal. Sept. 22, 2016). As long as plaintiffs offer a
 6 plausible theory as to why the conduct at issue could mislead a reasonable consumer, their claims
 7 should not be dismissed at the pleading stage. *Williams*, 552 F.3d at 940; *Chapman v. Skype Inc.*,
 8 220 Cal. App. 4th 217, 226-27 (2013). Moreover, a defendant can also violate the UCL “fraud”
 9 prong by making an omission that is “contrary to a representation actually made by the defendant,
 10 or an omission of a fact the defendant was obliged to disclose.” *In re Adobe Sys., Inc. Privacy*
 11 *Litig.*, 66 F. Supp. 3d 1197, 1229 (N.D. Cal. 2014); *Bruce v. Harley-Davidson, Inc.*, No. 9-6588,
 12 2010 WL 3521776, *5 (C.D. Cal. Apr. 19, 2010) (“[P]laintiffs’ allegations concerning
 13 defendants’ superior knowledge and active concealment of a ‘material fact’ could give rise to the
 14 reasonable inference that [defendant] was under a duty to disclose.”).

15 Plaintiffs’ allegations here more than suffice to state a plausible theory of both falsity and
 16 a tendency to deceive. Plaintiffs allege that Defendants made multiple false representations and
 17 material omissions related to the sale of the STMs, fraud that deceived the public. They failed to
 18 mention: (1) the breadth of the five-plus-year pre-existing conditions carveout; (2) the
 19 requirement that at least five years of medical records be submitted prior to claim coverage; and
 20 (3) that they engage in unlawful post-claims underwriting. There is little question that these
 21 omissions were material to Plaintiffs’ relationship with Defendants and that reasonable
 22 policyholders would want to know about such items prior to purchasing the STM. Or that, in
 23 context, these true facts render what Defendants claim about the quality of their services, and of
 24 what they uniformly promise about “trust[ing] the company” and coverage meaningless, or at
 25 minimum deceptive. *See, e.g.*, Compl. ¶¶ 42-53.

26 This axiomatic proposition is underscored repeatedly—and with specificity—throughout
 27 Plaintiffs’ Complaint, and Plaintiffs’ allegations show that Plaintiffs’ claims are shared by others.
 28 A former customer-service representative admitted that his job was *not* to help policyholders and

1 “it was obvious that the name of the game was runaround.” *Id.* ¶¶ 63, 67. Additionally, an STM
 2 insured wrote that he “deep[ly] regrets” choosing the insurance, because while he “was led to
 3 believe that this coverage was good short term insurance,” his claim was later denied under its
 4 five-year preexisting condition exclusion practice. *Id.* ¶ 73(b). This consumer’s advice, based on
 5 his experience with the bait-and-switch, is clear: “DO NOT EVEN CONSIDER THIS
 6 INSURANCE.” *Id.*; *see also id.* ¶ 73(c) (“I would NEVER, EVER suggest that anyone purchase
 7 insurance from HCC.”). Reasonable consumers are likely to be—and in fact have been—
 8 deceived by the alleged misrepresentations and omissions at issue.

9 Moreover, CBA’s premature fact-based argument that it has no culpability in these
 10 misrepresentations and omissions is simply untrue. The record makes clear that CBA *is* complicit
 11 in the advertising and marketing of the STMs. The brochure referenced in Plaintiffs’ Complaint
 12 (*see, e.g.*, Compl. ¶¶ 42-49) and included as Exhibit 11 to the Padgett Declaration specifically
 13 *singles out* CBA and its role in providing the STMs. In pertinent part, the brochure states:

14 **Consumer Benefits of America**

15 In most states, HCC Life STM is available to members of the
 16 Consumer Benefits of America Association. Membership in
 17 the association will entitle you to discounts of up to 40%
 18 off regular retail prices on many short-term and long-term
 19 prescription drugs. Discounts are available from over
 20 59,000 participating pharmacy providers nationwide or
 by mail service. When membership is required, association
 fees are assessed at the time of application; enrollment in
 the association is automatic upon payment of the correct
 premium and all applicable

21 Padgett Decl. at 66. A disclaimer on the same page further states that an “applicant may be
 22 required to enroll in the Consumer Benefits of America Association.” *Id.* As a general matter,
 23 but *certainly* at the pleadings stage, CBA cannot credibly contend that it has nothing to do with
 24 this marketing material when the very material it disclaims contains explicit advertisements for
 25 CBA and its services. It strains credulity—and flies in the face of the Complaint’s allegations—
 26 for CBA to aver that it never reviewed, approved, or otherwise participated in generating the
 27 marketing materials in question. Accordingly, Plaintiffs’ UCL and FAL claims are proper and
 28 CBA’s motion should be denied.

1 CBA's cases do not support a contrary result. It does not cite any cases in its FAL
2 section. In its UCL section about fraud, it relies on *Rubke v. Capitol Bancorp*, 2006 WL 1699569
3 (N.D. Cal. June 16, 2006), a class action under the securities laws in which the plaintiff class,
4 minority shareholders who had sold shares pursuant to a tender offer, alleged that that defendants
5 had engaged in a scheme to lower the value of their stock and engaged in related fraudulent
6 conduct to encourage acceptance of the tender offer. In addition to being entirely factually
7 inapposite, that case arises under the Private Securities Litigation Reform Act, whose "stringent
8 requirements" of pleading fraud and scienter are not applicable here. *Id.* at *5.

B. Plaintiffs Adequately Allege that CBA's Conduct Also Violates the Unfair and Unlawful Prongs of the UCL.

11 The UCL’s coverage is “sweeping,” and its standard for wrongful business conduct is
12 “intentionally broad.” *In re First Alliance Mortg. Co.*, 471 F.3d 977, 995 (9th Cir. 2006). A
13 claim under the “unfair” prong should survive a motion to dismiss if facts are alleged that, if
14 proven true, could establish a violation. *McNeary–Calloway v. JP Morgan Chase Bank, N.A.*,
15 863 F. Supp. 2d 928, 961-62 (N.D. Cal. 2012). “[T]he determination of whether a business
16 practice is unfair is ‘one of fact which requires a review of the evidence from both parties’ and
17 often cannot be made solely on the pleadings.” *Ferrington v. McAfee, Inc.*, No. 10-1455, 2010
18 WL 3910169, at *13 (N.D. Cal. Oct. 5, 2010) (quoting *McKell v. Wa. Mut., Inc.*, 142 Cal. App.
19 4th 1457, 1473 (2006)).

20 Plaintiffs here sufficiently plead “unfair” conduct by Defendants, including CBA, under
21 the “balancing” test (which compares the gravity of the plaintiff’s harm to the utility of the
22 defendant’s conduct) and “tethering” test (which examines whether the alleged misconduct is
23 tethered to a legislatively declared policy) that are both applied by California courts. *Ferrington*,
24 2010 WL 3910169, at *12 (describing the two tests and explaining that California courts are
25 divided on which applies); Compl. ¶¶ 95, 98-99.

26 Here, the allegations that Defendants omitted and misrepresented material facts about how
27 they use and misuse their pre-existing condition limitations and deny payments are basically the
28 essence of an unfair balance. Insurance is only relevant when you need it, by definition. If only

1 those who need it are denied it, this is all benefit to the insurer (and, here, CBA and HII as well)
 2 and all detriment to the insured. Illusory insurance is of no benefit to consumers. Notably,
 3 CBA's own case law supports this conclusion. In *Smith v. State Farm Mutual Automobile Ins.*
 4 *Co.*, 93 Cal. App. 4th 700 (2001) the court listed examples of unfair business practices and
 5 included "placing unlawful or unenforceable terms in form contracts . . . asserting contractual
 6 rights one does not have . . . and [systematically] breaching a form contract affecting many
 7 consumers." *Id.* at 719. Although the list is by no means exclusive, the sort of systematic bad
 8 faith Plaintiffs have alleged is plainly unfair.

9 Plaintiffs' allegations of statutory and common law violations also state a claim under the
 10 UCL's "unlawful" prong. *See generally Saunders v. Superior Court*, 27 Cal. App. 4th 832, 838-
 11 39 (1994) ("The 'unlawful' practices prohibited by section 17200 are any practices forbidden by
 12 law, be it civil or criminal, federal, state, or municipal, statutory, regulatory, or court-made.");
 13 *Abels v. Bank of Am.*, No. 11-208, 2011 WL 1362074, at *4 (N.D. Cal. Apr. 11, 2011) ("An act is
 14 'unlawful' under section 17200 if it violates an underlying state or federal statute or common
 15 law.").

16 In addition to its other unlawful conduct, Defendants breach California Insurance Code
 17 § 332 by failing to communicate in good faith: (1) that their policies did not include claims for
 18 conditions that were diagnosed or treated within five years of the effective date of coverage; (2)
 19 that Plaintiffs would be required to provide years of medical records in addition to a proof of loss
 20 form to get their claims paid out; (3) that it would be impracticable to fulfill Defendants'
 21 inevitable requests to provide such medical records; and (4) that Defendants do not have a fair
 22 claims process or functional customer service. Compl. ¶¶ 26-28, 33-38, 58-73. Further, and
 23 perhaps even more significant, the requirement that Plaintiffs submit five years of medical
 24 records only *after* they were deemed eligible for a policy, *after* Defendants accepted and invested
 25 their premium payments, and *after* Plaintiffs had submitted a claim, is a textbook example of
 26 post-claims underwriting, which California Insurance Code § 10384 prohibits.

27
 28

1 C. Plaintiffs Adequately Allege Contract-Based Claims Against CBA: Breach of
 2 Contract and Breach of the Duty of Good Faith and Fair Dealing.

3 CBA cannot convincingly claim it “was never a party to any contract with Plaintiffs.”
 4 Mot. at 7. As Plaintiffs allege in the Complaint, “[t]he policies that Defendants sold Plaintiffs,
 5 combined with the timely payment of premiums amounted to legally enforceable promises and
 6 obligations via contract.” Compl. ¶ 118. And the record that Defendants improperly introduce
 7 actually corroborate Plaintiffs’ allegations in that they show that CBA was a party to the
 8 certificate of insurance issued to Plaintiff Buckley (Padgett Decl. at Exhibit 15) and Plaintiff
 9 Azad (Padgett Decl. at Exhibit 13)—in fact, both documents state, on their first page, that the
 10 respective policies have “been issued to Consumer Benefits of America which we will refer to as
 11 ‘the Policyholder.’” Padgett Decl. at 74, 117. Those same documents further state “**THIS**
 12 **CERTIFICATE IS EVIDENCE OF A CONTRACT BETWEEN THE POLICYHOLDER**
 13 **AND THE COMPANY**” (which is defined as HCC). *Id.* (emphasis in original).

14 In addition, or in the alternative, Plaintiffs assert a valid breach of good faith and fair
 15 dealing claim against CBA. The covenant of good faith and fair dealing “is implied as a
 16 supplement to the express contractual covenants to prevent a contracting party from engaging in
 17 conduct which (while not technically transgressing the express covenants) frustrates the other
 18 party’s rights to the benefit of the contract.” *Racine v. Laramie, Ltd., Inc. v. Dep’t of Parks and*
Recreation, 11 Cal. App. 4th 1026, 1031-32 (1992).

20 A covenant claim can thus exist alongside, or instead of, a breach of contract claim, and
 21 has been applied in similar consumer class action contexts. *See, e.g., In re Bank of Amer. Credit*
Protection Mktg. & Sales Practices Litig., No. MD-11-2269 TEH, 2012 WL 1123863, at *5
 22 (N.D. Cal. Apr. 3, 2012) (holding, in case involving credit card add-on products that purported to
 23 insure against problems faced by borrowers that could render them unable to pay, “Plaintiffs’
 24 contention that the enumeration of allowable fees implies that the cardholder may expect to be
 25 free from further charges not expressly disclosed or referenced in the agreement is not so beyond
 26 the realm of credibility that dismissal would be appropriate at this stage”); *Nasseri v. Wells*
 27 *Fargo Bank, N.A.*, 147 F. Supp. 3d 937 (N.D. Cal. 2015) (finding Wells Fargo hindered plaintiffs’

1 ability to perform and refused to reinstate her loan in bad faith); *In re Chase Bank USA, N.A.*
 2 “*Check Loan*” *Contract Litig.*, 274 F.R.D. 286 (N.D. Cal. 2011) (granting class certification as to
 3 good faith and fair dealing claim).

4 Here, CBA breached the covenant. Defendants, including CBA, systematically frustrate
 5 expectations by erecting common and insurmountable roadblocks (including via unlawful post-
 6 claims underwriting) to paying claims, without acknowledging they are doing so and even
 7 denying that they will never pay. Defendants hinder insureds’ ability to perform by their claims.
 8 This is classic bad faith.

9 **D. Plaintiffs Adequately Allege Unjust Enrichment.**

10 In stating that there is no claim for unjust enrichment, CBA ignores recent Ninth Circuit
 11 authority holding that unjust enrichment is a claim for relief in and of itself. *See, e.g., Berger v.*
 12 *Home Depot USA, Inc.*, 741 F.3d 1061 (9th Cir. 2014). While Plaintiffs recognize the case law
 13 providing that an unjust enrichment claim should not be brought alongside a UCL claim for
 14 restitution when it is duplicative, they respectfully submit that this is not a basis to dismiss
 15 Plaintiffs’ claim, for various reasons.

16 First, in light of this recent Ninth Circuit authority, those holdings dismissing unjust
 17 enrichment claims at the pleading stage are hard to reconcile with the entitlement of alternative
 18 pleading under Rule 8 of the Federal Rules of Civil Procedure. Rule 8(d) establishes that unjust
 19 enrichment may be pled in the alternative to contract or statutory claims, as Plaintiffs have done
 20 here. Compl. ¶¶ 141-46.

21 Second, and relatedly, CBA challenges the UCL claim. Although its arguments lack merit
 22 for the reasons in Section A above, it cannot seriously dispute Plaintiffs’ right to restitution in
 23 some form. Even the cases it cites (neither of which is at the pleading stage) so allow, and CBA’s
 24 reliance on them is thus misplaced. *See Bank of New York Mellon v. Citibank, N.A.*, 8 Cal. App.
 25 5th 935, 955 (2017) (rejecting defendant’s argument that plaintiff-appellant’s claim for unjust
 26 enrichment should be dismissed, on the basis that “we are not bound by the form of appellant’s
 27 claims or the relief demanded” and finding that plaintiff *had* stated a claim for equitable
 28 subrogation, which “may be used to *enforce restitution in order to prevent unjust enrichment*”)

1 (emphasis added); *cf. Meister v. Mensinger*, 230 Cal. App. 4th 381, 403 (2014) (discussing at
2 length the relationship of restitution to disgorgement; rather than rejecting the principle of unjust
3 enrichment, the court only held that the trial court, with the assistance of experts, was unable to
4 ascertain “how respondents were enriched, let alone unjustly enriched, by their conduct”).

5 Third, Plaintiffs expressly seek both restitutionary *and* non-restitutionary disgorgement,
6 making their claim non-duplicative on its face. Compl. at 30 (¶¶ C and D). And, as a substantive
7 matter, Plaintiffs have alleged not only that Class members spent money they would not have had
8 to spend, but that Defendants have been unjustly enriched in the form of “higher premiums *and*
9 greater revenues than they would have enjoyed had they acted lawfully.” Compl. ¶ 143. The
10 type of recoupment enjoyed by all Defendants was expressly noted as not being limited to the
11 nominal insurer, but included other economic gains beyond premiums. At the pleading stage,
12 Plaintiffs have more than adequately alleged that all Defendants have been unjustly enriched.

E. Plaintiffs Should Be Permitted to Amend the Complaint if the Court Identifies Any Pleading Infirmities.

15 “Dismissal without leave to amend is improper unless it is clear . . . the complaint could
16 not be saved by any amendment.” *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 972 (9th Cir. 2009);
17 Fed. R. Civ. P. 15(a)(2) . “[R]equests for leave to amend should be granted with “extreme
18 liberality.” *Moss*, 572 F.3d at 972.

19 Plaintiffs have articulated viable legal theories for each of the claims discussed in this
20 brief, and should be afforded an opportunity to allege more facts should the Court require it.

CONCLUSION

22 For the reasons set forth above, Plaintiffs respectfully submit that CBA's motion to
23 dismiss should be denied in its entirety.

25 || Dated: May 12, 2017

LIEFF CABRASER HEIMANN & BERNSTEIN, LLP

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